

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 03/01/06;
Decision Issued: 03/03/06; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8280; Outcome: Agency upheld in full; **Administrative Review: EDR Ruling
Request received 03/10/06; EDR Ruling No. 2006-1310 issued 06/22/06;
Outcome: HO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8280

Hearing Date: March 1, 2006
Decision Issued: March 3, 2006

PROCEDURAL HISTORY

On September 23, 2005, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior. On October 6, 2005, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 2, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 1, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Juvenile Justice employs Grievant as a Juvenile Correctional Officer at one of its Facilities. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Grievant and Sergeant C were scheduled to attend an in-service training class on August 18, 2005. As Grievant and Sergeant C passed in the parking lot of the Facility as each was on his way to the class, Sergeant C said "Good morning" to Grievant. Grievant responded, "Don't say good morning to me!" Sergeant C responded, "I am sorry, sir. I say good morning to everybody." Sergeant C continued to walk towards the classroom. Sergeant C entered the classroom and sat at the table. Grievant also entered the classroom and sat at the table.

At approximately 8:05 a.m., the Training Sergeant began the class. Grievant was seated at a table with Sergeant C and was approximately five to six feet from him. Grievant raised his hand in order to be recognized. The Training Sergeant acknowledged Grievant and Grievant said "I want to say something to the class first." The Training Sergeant did not know why Grievant wished to speak but suspected Grievant may have wanted to comment on a recent employee death at the Facility. The Training Sergeant told Grievant, "No problem." Grievant stood up and pointed directly at Sergeant C. Grievant shouted, "Don't say a motherf—king thing to me. We have an ongoing issue. I don't want you to say sh-t to me. You hear me, don't say a motherf—

king thing to me.” Grievant’s voice was rude and threatening. Sergeant C did not respond. Sergeant W and the Training Sergeant had Grievant leave the room without further incident.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).¹ Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

“Disruptive behavior” is a Group I offense.² Grievant’s behavior on August 18, 2005 at approximately 8:05 a.m. was disruptive because (1) he diverted the students’ focus from their training to his personal dispute with Sergeant C, (2) he yelled and was rude and threatening with his comments, (3) he used profanity, (4) he instructed an employee holding higher rank how to behave without having the authority to do so, and (5) he forced the Agency to remove him from the training thereby preventing him from receiving necessary training. The Agency has presented overwhelming evidence to support its issuance of a Group I Written Notice for disruptive behavior.

Grievant contends Sergeant C intentionally manipulated Grievant in order to provoke Grievant. Grievant argues that Sergeant C was nice to Grievant precisely because Sergeant C knew Grievant had a dispute with Sergeant C and by being nice to Grievant, Sergeant C knew it would upset Grievant. When Grievant told Sergeant C not to say good morning to him, Grievant was expecting Sergeant C to respond that he would not talk at all to Grievant. When Sergeant C said, “I am sorry, sir. I say good morning to everybody”, that was not the response Grievant wanted from Sergeant C. Grievant believed Sergeant C might try to talk to him during the training session and Grievant wanted to prevent that from happening. Grievant viewed Sergeant C’s behavior as one more example of harassment.

No credible evidence was presented to establish that Sergeant C intended to manipulate Grievant. Sergeant C’s statement that he says good morning to everybody is the most likely explanation as to why he spoke to Grievant that morning in the parking lot. No credible evidence was presented to establish that Sergeant C was harassing Grievant.

¹ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² DHRM Policy § 1.60(V)(B)(1)(e).

If the Hearing Officer assumes for the sake of argument that Sergeant C intended to upset Grievant by being nice to Grievant, there is no policy, procedure, logic, or reasoning that justifies Grievant's behavior during the training session.³ A training session was not the appropriate forum for Grievant to air his complaints against Sergeant C. By assuming his dispute with Sergeant C took priority over the Agency's training class and speaking to Sergeant C during the class, Grievant engaged in disruptive behavior.

Grievant contends the Agency is retaliating against him for reporting abuse by a juvenile correctional officer of a ward. This abuse occurred in November 2004, before Sergeant C began working at the Facility. No credible evidence was presented to suggest that the Agency took disciplinary action against Grievant because he engaged in protected activity. The evidence showed that the Agency disciplined Grievant because his behavior was inappropriate and disruptive.

Grievant contends the Lieutenant intentionally scheduled Grievant and Sergeant C to attend the training at the same time in order to provoke Grievant. No credible evidence was presented to support this assertion. Grievant did not call the Lieutenant as a witness. No policy, practice, or procedure requires the Agency to determine whether Grievant had concerns with other employees and, if so, prevent those other employees from receiving training at the same time Grievant received training. Grievant lacks the authority or right to decide which employees will receive training and when they will receive training.

Grievant contends the Agency discriminated against him because of his race. For example, he contends the Training Sergeant exaggerated his account of the incident on August 18, 2005 in order to justify disciplinary action. No credible evidence was presented to support Grievant's allegation. The Training Sergeant's testimony was credible and revealed that Grievant's behavior was disruptive. The Agency did not discriminate against Grievant because of his race.

Grievant contends the disciplinary action should be mitigated. *Va. Code* § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."⁴ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider

³ Agency Policy 05-009.2, Staff Code of Conduct, requires employees to "treat all persons in an evenhanded and courteous manner, humanely and with respect."

⁴ *Va. Code* § 2.2-3005.

management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing

officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁵

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.